

WEIL, GOTSHAL & MANGES LLP

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R. BRUCE RICH
DIRECT LINE (212) 310-8170

February 12, 1998

The Honorable Lewis Hall Griffith
The Honorable Jeffrey S. Gulin
The Honorable Edward Dreyfus
c/o Gina L. Giuffreda
Copyright Arbitration Royalty Panel
Library of Congress
P.O. Box 70977
Southwest Station
Washington, D.C. 20024

Re: Noncommercial Educational Broadcasting
Compulsory License, Docket No. 96-6 CARP
NCBRA

Dear Judges Griffith, Gulin and Dreyfus:

This responds to ASCAP's February 10 and February 11, 1998 correspondence on the subject of the venue of the forthcoming hearings.

We respectfully submit that the issue presented is not, as ASCAP somewhat heatedly suggests, one of holding counsel to alleged prior understandings; rather, it entails weighing a combination of equitable and practical considerations of the type cited in my February 5 correspondence. In this regard, I am constrained, because of the offensive tone of Mr. Schaeffer's correspondence, simply to note that a fair reading of the February 3, 1998 hearing transcript makes plain the caution I expressed as to our clients' preparedness to try part or all of the case in New York, pending further consideration of all relevant factors. See Tr. at 29-30, 63-64.

As to the equities, were ASCAP permitted to put on its entire case in New York, there is every reason to believe that BMI, which has otherwise been willing to

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accommodate the public broadcasters' circumstances, will seek to have part or all of its case similarly heard in New York. The combined effect would be to place the primary travel burdens on our Washington-based clients, and effectively preclude PBS' in-house counsel, who has been intimately involved in this proceeding, from attending a significant portion of the hearings. We submit that the strong presumption ought to be that the hearings go forward in Washington, absent agreement among all parties and the Panel to alternative arrangements. Where moving the situs of the hearings will work a hardship on one of the parties, there would seem to be little merit in doing so.

Turning to the proposed logistics of having ASCAP's case heard in New York, ASCAP's February 11 letter leaves unanswered many more issues than it addresses or proposes to resolve:

1. While ASCAP proposes to supply office accommodations to the panel members, no mention is made of providing suitable secure facilities for use by the Weil, Gotshal and Hughes, Hubbard law firms. Such facilities not only would be required to hold our law firms' confidential work papers, but also would need to be equipped, at a minimum, with adequate telephone, fax and computer capabilities.

2. We have reservations about the assignment of White & Case employees to assist the arbitrators. Without impugning anyone's integrity or motives, the fact is that such employees have a fiduciary duty to the law firm and there is inherent in such proposal at the least the appearance of impropriety.

3. ASCAP is silent on the matter of affording public access to what are presumptively public hearings. It is to be expected that any number of interested third parties will want to attend portions of the hearings, whether they are members of the press, members of the general public, or otherwise. Whereas the Library of Congress facility is well suited to such access, it is far from clear that White & Case's offices are similarly well-suited.

4. We are left in the dark as to the cost implications of much of ASCAP's proposal. A general range of hotel rates is provided, but no mention is made of (i) court reporting fees, (ii) the charge, if any, for using White & Case's conference facilities, (iii) the rate at which paralegal assistance (which, as noted, we find

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improper) would be provided, and (iv) whether ASCAP proposes to charge for secretarial assistance. In short, ASCAP's letter forms no basis for assessing the true cost of moving hearing dates to New York.

5. Were the Panel to determine that certain hearing dates should go forward in New York, in no event do we believe it appropriate that opening arguments should be held in New York, let alone at the offices of one of our adversaries. There is no reason that the sole proposed ASCAP witness slated for February 26, who we expect will be examined but briefly, cannot appear for her examination at the Library of Congress.

We finally must object to the new proposal to present ASCAP's key economic witness, Peter Boyle, significantly after the conclusion of the rest of ASCAP's case. Indeed, ASCAP's proposal to present Dr. Boyle on March 30th would entail his appearing following BMI's case and very possibly during the middle of our own.

ASCAP was insistent on putting on its case first. Reluctantly, our clients agreed to that sequence but would not have had ASCAP advised us of its intention to reserve Dr. Boyle to appear at a later point in the hearings. While Mr. Schaeffer has, since transmitting his correspondence, advised me that Dr. Boyle will be "away" for a two-week period in March, surely this could not have come as a surprise to ASCAP at this late date and should, at a minimum, have been raised at the February 3 hearing.

Our position, simply, is that if ASCAP persists in wanting to put on its case first, its entire case should go on first -- including Dr. Boyle.

Respectfully,



R. Bruce Rich

RBR:hf

cc: Phillip Schaeffer, Esq.
Norman C. Kleinberg, Esq.

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VIA FACSIMILE

Ms. Gina L. Giuffreda
Copyright Arbitration Royalty Panel
Library of Congress
P.O. Box 70977
Southwest Station
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Re: Noncommercial Educational Broadcasting
Compulsory License, Docket No. 96-6 CARP
NCBRA

Dear Ms. Giuffreda:

I would appreciate your transmittal of the
enclosed correspondence to the panel members.

Respectfully,


R. Bruce Rich

Enclosure
RBR:hf

cc: Phillip Schaeffer, Esq.
Norman C. Kleinberg, Esq.